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PROGRESS TOWARD INTERNATIONAL ACCORD*

I make no apology for asking your attention at this time to a subject outside the general current of your study and probable practice.

This institution among the earliest gave attention to the study of International Law. One of its greatest Presidents has contributed profoundly to that study. You have recently in your law publication been giving abundant space to the law of nations. Your distinguished Dean made a notable contribution to the discussion of a World's Court. And now the presence in your faculty of the distinguished jurist and statesman whose proposal of general arbitration has signally advanced that cause, justifies again the absence of apology.

It is now a hundred and sixteen years since the first arbitration between Great Britain and the United States. In his closing argument the agent of the United States, James Sullivan, used these words:

"Why shall not all the nations on earth determine their disputes in this mode rather than choke the rivers with their carcasses and stain the soil of continents with their slain?"

That arbitration concerned the eastern boundary between the United States and New Brunswick, the St. Croix River boundary. It had been said by Mr. Hamilton that,

"Territorial disputes have at all times been found one of the most fertile sources of hostility among the nations. Perhaps the

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greatest portion of the wars that have desolated the earth have sprung from this origin."

Certainly the progress of the world is sharply marked by the change of view in this particular. No one now really contends that the question of boundary may not be dealt with by arbitration, or that the honor of nations is so bound up in invisible lines that there can be no demarcation except in blood.

These words of Mr. Sullivan were far from being the earliest expression of the aspiration toward peace. It was current in the thought of the day. Only two years before, Kant had descended from the realms of pure logic and abstract philosophy to propose the Federation of Free States.

Bentham less than a decade before had set forth his proposal for a general Diet of Nations to which each of the Great Powers was to send two deputies, and whose decrees were to be enforced by placing a recalcitrant power under the ban of Europe. Early in the same century Abbe St. Pierre, far in advance of his time, had proposed a General League of Christendom, by which war might be abolished and the dignity and honor of states upheld by peaceful means.

The time was not ripe. The centuries' old custom of conflict was not lightly or swiftly to be put aside. The white agony of the Napoleonic wars was overspreading the land Two decades of devastation awaited Europe. Well might it then have been said—and no doubt was said—that St. Pierre and Kant and Bentham were mere dreamers, and that Peace was an inaccessible Utopia.

Now, after a century of education, after the foundation of thousands of peace societies, after councils and conferences and conventions without number, again;

> "The earth is full of anger;
> The seas are dark with wrath,
> The nations in their harness
> Go up against our path."

The titanic struggle between Russia and Japan is scarcely over when Italy crosses the Mediterranean to Tripoli; the Balkan States rise against Turkey, and China in rebellion overthrows the Manchus. The sneer is easy that the Peace Movement is a failure, that law will never be substituted for war, and that the true advocate of peace is one who is willing to fight for it.

Of course, it is true that war has not ceased from the earth, and it may well be conceded that M. Leon Bourgeois at the last Peace Conference at The Hague was right when he said,

"There is a vast number of political questions which the condition of the world does not yet permit to be submitted universally and compulsorily to arbitration."

President Eliot has recently pointed out the causes that still make for war. Devoted as we may be to the cause of peace, and recognizing as the world does the hideousness of war, we cannot regret the uprising in China or in the Balkans. The determination of such struggles is not within the present day accord of nations, or within the province of law and arbitration. But they do not retard the progress of that accord or the establishment of respect for law in the broad and swiftly widening field which they occupy.

Even our boasted common law does not in every event secure us against appeals to force. England is not free from it in a struggle for suffrage. Labor contests are not free from it even under the shadow of the court house. Our law recognizes that its processes in riot, violence and insurrection may be suspended by executive action and that it cannot inquire whether the condition exists on which the suspension is based. Constitutions secure the public safety by this delegation of autocratic power. "Public danger warrants the substitution of executive process for judicial process." (*Moyer v. Peabody,* 212 U. S., 78, *in re Moyer,* 35 Colorado, 159.

We need not stop with this reply. We may well consider what the century has brought forth. Just now we are preparing to celebrate a hundred years of peace between two great peoples who had twice previously been at war in a third of that time. We are thus brought face to face with the fact that for a century the English-speaking nations have been at peace between themselves. They have not been peaceful because decadent, but have overspread the earth and covered the seas with their commerce. Rivalries and far-flung lines of contact, however, have not embroiled them. For well nigh half a century the nations of Western Europe too have been at peace Burdened bmy armaments, they have not drawn the sword. The peace of the Atlantic has been preserved. Ships of war which would have sunk Armadas in an hour sweep over it, but they have not destroyed each other.

Storm clouds do not disappear in an hour and leave clear skies. We may well hail the fact that a third of the sky has already cleared; that westward from the Vistula to the Pacific the nations have learned not to war with each other. It cannot be said that they have laid down their arms. Heavier and heavier has grown the burden of armament, till nations, like knights of old in chain and plate, stumble about or stand still from their weight of preparedness.

The fact remains, however, that more and more they keep the peace. When conflict has seemed inevitable, they have made treaties or joined in arbitration. "Peace with honor" has been cabled home, and the dogs of war have slept in their chains.

It is no part of my purpose to follow or extol the peace propaganda of the century, notable as it has been, but to ask your attention to the part that trade has played in pacification.

Shortly after the conclusion of the War of 1812 it seemed that the clouds were returning after the rain. No provision had been made in the Treaty of Ghent concerning the North Atlantic Fisheries, and England's enormous fleet, released from the fear of French invasion, was free to enforce what she deemed to be her rights. Shortly after the treaty was concluded *H. M. S. Jaseur* warned a vessel of the American fishing fleet to keep sixty miles off the coast of Nova Scotia. American vessels were pursued and seized and the peace seemed likely to be one of months rather than of a century.

Mr. Adams, then Secretary of State, meeting the British Minister one day upon the street, in 1818, and discussing the fisheries situation with him, said that he believed that they "should have to fight about it, and that his opinion was that they ought to do so."

The British Minister reports the conversation to the Foreign Office and expresses doubt of Mr. Adams being able to carry the country into a war to enforce rights which his own section, New England, was chiefly, if not solely, interested in.

But there was to be no war. Another factor than that of reprisal was coming into the councils of nations. Trade was to be considered as well as glory.

Earlier, when Mr. Adams was Minister to the Court of St. James he had urged upon Lord Bathurst that "independent of the question of rigorous right, it would conduce to the substantial interests of Great Britain herself" to renew the fishing privileges.

And speaking of New England, that "to another and perhaps equally numerous class of her citizens they (the fisheries) afforded the means of remittance and payment for the productions of British industries and ingenuity imported from the manufactures" of England.

Lord Bathurst replied that though His Majesty's Government could not concede the other positions taken by Mr. Adams, which he enumerated, "yet they do feel that the enjoyment of the liberties formerly used by the inhabitants of the United States may be very conducive to their national and individual prosperity. * * * And this feeling operates most forcibly in favor of concession."

Giving all possible force to the generous dispositions of His Majesty's Government toward the United States, it cannot be doubted that its subsequent agreement on the fisheries was influenced by the fact that a prosperous America would be a better customer than an impoverished one. At all events, the Treaty of London was the result.

It is to be noted that in those years, 1815 to 1818, the first Peace Societies were formed, so that suasion and trade marched together.

There is an old saw which is still resonant, that "trade follows the flag." In the old days it did. Conquest of territory was not merely for conquest. The conquering nation excluded others from trade with the acquired territory. One of the prime causes of the Revolution was the strict limitation of American commerce to the products and manufactures of the old country, and after the Revolution, down to 1830, the dependencies now constituting Canada were prohibited by the mother country from trading with us and we with them. Their ports were closed and so were ours.

But a broader policy was seeking recognition Any country was a better customer if it was rich and it could become rich by general trade, more surely and more rapidly than by pent-up commerce, and so it was that by Orders in Council on the one hand and by presidential proclamation on the other, the barrier between Canada and the United States were thrown down and trade followed, not the flag, but its natural channels. Twice since then this freedom of trade has been endangered, once in 1870 when General Grant asked Congress to give him power "should such an extreme measure become necessary—to suspend the opera-

tions of any laws whereby the vessels of the Dominion of Canada are permitted to enter the waters of the United States." Later, in 1887, the Congress made it the "duty" of President Cleveland in case in his judgment our fishing vessels were "unjustly vexed or harassed" in the enjoyment of their rights under the Treaty of 1818, "to deny vessels and crews of the British Dominions of North America any entrance into the waters or ports of the United States", and to deny entrance into this country of any fish or other products of said Dominions. It was not necessary that this authority should be exercised in either instance. The Treaty of 1871 and the proposed Treaty of 1888 solved the situation.

Although the latter was only a proposal and was finally rejected, the modus therein determined upon and afterwards renewed was effective and a system of licenses to American fishing vessels dispelled a war cloud. The pen is mightier than the sword, and trade is mightier than war.

The fact is that trade itself had received a stupendous impulse. The life of nations as well as individuals was being revolutionized. The handmaiden of trade is transportation, and transportation was in process of change from the grub to the butterfly.

It is difficult for us now to realize the sluggard, snail-like pace of commerce a hundred years ago. It hugged the coast in little sloops and schooners. It was mired in roads which we today would deem impassable. Trade was in the village and with the nearby town. Commerce, as we know it, was non-existent. A brig or ship of a few hundred tons came occasionally across the seas. Fishing vessels of less than a hundred ton transported their catch to foreign markets. Land communication was meagerer still. Men on foot or horseback, or by stage, toiled over roads which were hardly more than tracks.

In 1798 the total number of vehicles in Boston, coaches, chairs, chaises and carriages, was one hundred and forty-five.

So late as 1826 Judge Story and Josiah Quincy, traveling to Washington, were so fortunate as to make the journey in eight days. Starting at five each morning and riding until well into the night, they made the trip from Boston to New York in four days, arriving in time for a late dinner, and Mr. Quincy writes in his diary,

"It need not be said that we congratulated ourselves upon living in the days of rapid communications and looked with commisera-

tion upon the conditions of our fathers who are known to consume a whole week in traveling between the cities."

The ocean voyage to England or to the Continent was a matter of weeks instead of days. Washington Irving, writing of his visit to England, says, "To the American visiting Europe the long voyage is an excellent preparative."

In 1830 Boston had a fortnightly line of packets to Liverpool, and New York was scarcely better off with its clipper ships. Nations were isolated, provincial, suspicious, resentful, belligerent.

The magic wand has been waived and space seems to have been annihilated. A single ocean greyhound will transport in a few days merchandise that fleets could not have carried in weeks a century ago.

Commerce is fluid; international and not provincial. Merchandise finds its level the world over with a change of pence or farthings in its value.

Law has necessity for its basis. The community was forced to protect its peace. It could not permit men to fight out their differences. The economic waste of personal confiict was too disastrous and the community established courts to settle controversies without bloodshed.

The world is rapidly becoming a community. Population flows swiftly and easily between many parts of the globe. Acquaintance between people of different nationalities is as great today as that between those of adjoining counties in former time. Commerce embraces the world. London and New York and Paris and Berlin are great clearing houses. No disaster comes to one but it is instantaneously felt by the others and by the world. We are more and more interdependent. The same necessity which compelled the establishment of courts and tribunals in communities is irresistably forcing their establishment between nations. Such courts are no longer the dreams of philosophers and philanthropists. They are necessitated by the ever increasing accord of nations.

It is a crude idea that such courts should exist merely to prevent war. Hundreds of international controversies would never lead to war, but it is nevertheless of vital importance that they should be determined and settled once for all. Diplomacy is constantly hampered by partisan and ill-informed popular opinion. Foreign Offices cannot always reach adjustments, not because

they cannot agree, but because politically it is not safe to agree. Nations taking untenable positions cannot easily retire from them without discredit. For the sake of good feeling and unimpeded and unhampered trade, adjustment must in some way be reached. In many controversies it is better that the controversy should be settled wrong, or partly wrong, rather than left as a standing menace, and so the nations have, with ever increasing frequency, resorted to arbitration Beginning with the year 1820 the recital is most impressive. Between that date and 1900 one hundred and seventy-two important arbitrations took place.

Eight arbitrations mark the period from 1820 to 1840; thirty arbitrations between 1840 and 1860; forty-four between 1860 and 1880; ninety arbitrations between 1880 and 1900. Many of these, notably the Geneva and Halifax arbitrations in the seventies, and that between Chile and Argentina, were most significant.

In 1853 the United States Senate voted to insert arbitration clauses in treaties thereafter to be made, providing that the arbitrators should be "eminent jurists having little or no connection with politics." In 1873 Parliament concurred in an address to the Queen that she instruct the Foreign Secretary to invite all nations to concur in a permanent system of arbitration. Similar acts were passed in other countries. It remained, however, for the Czar of all the Russias in 1898 to take the step which led to a general scheme of arbitration. Pursuant to his invitation the First Peace Conference met the following year and adopted the convention which established the Permanent Court of Arbitration.

It has been said that this is not a court, and is not permanent. In its actual structure it is only a clerk's office and a list of judges. The convention does not even bind nations to arbitrate, but provides a convenient means by which arbitration may be carried out. But the thing of vital import is that twenty-six of the great powers originally, and now forty-four, agree "to use their best efforts to insure the pacific settlement of international differences" and that before an appeal to arms they will "have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly powers." They "deem it expedient and desirable that one or more powers, strangers to the dispute, should, on their own initiative and as far as circumstances may allow, offer their good offices or mediation to the states at variance".

Once for all, not St. Pierre or Bentham or Kant or James Sullivan, but the nations of the earth, declare that "in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting power as the most effective and at the same time, the most equitable means of settling disputes which diplomacy has failed to setle." They say,

"International arbitration has for its object the settlement of differences between states by judges of their own choice, and on the basis of respect for law."

"With the object of facilitating an immediate recourse to arbitration for international differences"

they undertook to organize, and did organize, a tribunal "accessible at all times and acting in default of agrement to the contrary between the parties, in accordance with the rules of procedure inserted in the present convention."

An international bureau is established which is to be the "channel for communications relative to the meetings of the court." A course is mapped out for the selection of the judges for a given arbitration and for the pleadings and procedure before them unless the parties themselves have agreed upon some different course.

The hesitancy of conflicting powers to suggest resort to the tribunal is met by the provision that the signatory powers shall "consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them", and they declare that

"The fact of reminding the parties at variance of the provisions of the present convention, and the advice given them in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as in the nature of good offices."

From being an affront and sometimes a cause of war for a third party to intervene, it becomes the duty of the third power wherever such intervention is conceived to be of value. From being the chance result of diplomacy a plan road to arbitration and accord is marked out.

Twelve arbitrations stand thus far to the credit of the Permanent Court. It is not to be expected that the docket of a world's court will be overcrowded. The procedure is expensive. It is convened with deliberation. It is urged that it lacks, or may lack continuity as to the principles underlying its decisions. But

it can surely be said that those decisions have been made "on the basis of a respect for law," and have been adjudications and not diplomatic compromises. Though its decisions have no binding force even upon future arbitrators drawn from its own panel, it can hardly be doubted that practically they will be controlling. It is well nigh certain, for instance, that the Pious Funds Case fixes the doctrine of *res adjudicata* permanently in the court and in international law. The same thing is true as to the limitations on the doctrine of international servitudes pronounced in the North Atlantic Fisheries Arbitration.

It is true that no marshal or sheriff or international police is provided to enforce the decrees of the tribunal, but it is provided that the very agreement to arbitrate "implies the undertaking of the parties to submit loyally to the award." Such submission in the past has always taken place. Great Britain complained bitterly of the Alabama Award of fifteen million, but the award was paid. The United States with equal bitterness complained of the five and a half million award at Halifax, but paid it, nevertheless. Each party exercised its constitutional right to denounce the court behind the court house, but it accepted the result as private litigants do and as nations always must.

It is idle to talk of lack of sanction when we hear so much of national honor and vital interests. No interest is so vital to a nation that it can face the dishonor of disobedience to the mandate of a court or tribunal to whose decision it has voluntarily submitted itself.

The formation of the Permanent Court was not the only step toward the accord of nations taken by the Conference of 1899. As a rule variance between nations arises from a disagrement concerning the facts. Each one of the contending parties of necessity ascertains the facts *ex parte* and usually from partisan and prejudiced sources. Oftentimes the exchange of evidence between diplomatic offices fails to result in concurrence. The peoples of the two countries gain little real knowledge through the inflammatory statements of the daily press, and governments the best intentioned find the situation out of hand. Usually if the facts could be ascertained the cause for hostilities would disappear.

No greater service was rendered by the Conference of 1899 than the provision for International Commissions of Inquiry. Barring questions of honor and vital interests, the signatory

powers declared that they deemed "it expedient that the parties who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an international commission of inquiry, to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation."

The delicacy of the situation is well illustrated by the reticence of the language used. The nations do not bind themselves to institute inquiry into their differences. The convention is declaratory and not contractual or obligatory, but it goes forward to provide a mode, elaborated by the Conference of 1907, for the composition and procedure of the commission.

It would seem on the surface that little progress had been made and that the Conference had been doing little more than marking time. But this is only a superficial judgment based on the cautious phrasing of international agreement. It marks a distinct progress in the accord of nations. It furnishes a text to which in times of strained relation either party to a controversy may advert. Previous to its existence each party feared that a proposal for inquiry would indicate a sense of weakness and would be received at home, as well as in the opposing country, as a badge of cowardice. To be able to point to such a mode as having international sanction does much to insure accord. More than this, it gives an interval for the blood to cool. Individual conflict comes as often as otherwise from the fear that the other party will shoot first. An invitation to visit the court house and confer with the judge makes it highly improbable that shooting will occur at all.

So much for the results of the Conference of 1899. It was not contemplated when it adjourned that a further conference would shortly be called. Further development was to be left to the slow processes of time and diplomacy. It is significant, therefore, of the satisfaction that was felt in what it had done and confidence that more could be accomplished that seven years later, at the close of the war between Russia and Japan, the Czar of Russia by common consent called a second conference and that forty-four powers were represented by duly accredited delegates. Its chief accomplishment was the establishment of a Court of Prize, with a fixed body of judges. This was the great step. During the last century nations had frequently agreed to arbitration, but in each instance had selected in one form or another the

judges who were to sit. In private arbitration this is often deemed a *sine qua non,* and so of arbitration between nations. The advance made in this respect by the Convention of 1899 was merely that the nations agreed to establish a definite list and if they arbitrated at all, to select the judges from that list. Beyond that they were not prepared to go.

The Prize Court takes the next step. An actual court of fifteen members is created with appellate jurisdiction from national prize courts of last resort. Great difficulty was experienced in securing agreement as to the composition of the court and a number of countries have not, for that reason, given in their adherence to the convention, though accepting it in principle. Certain countries, notably our own, found constitutional difficulty in submitting decisions of their highest courts to reversal by a foreign tribunal. Whether this can be met by the proposal for a proceeding *de novo* before the International Prize Court remains to be seen. What is important to our present purpose, however, is that thirty-three of the nations, including all but one of the great maritime powers, accepted the convention and that now for the first time in the history of the world there is "a really Permanent Court of Nations with obligatory jurisdiction."

The Conference did not pause, however, with the establishment of the Prize Court. In addition to it, and in addition to the Permanent Court of Arbitration, a Court of Arbitral Justice or Judicial Arbitration Court, was proposed by the delegates of the United States.

The subject has been so recently and so completely dealt with by the distinguished Dean of this School, as well as by Dr. Tryon in the pages of your LAW JOURNAL that any general discussion is superfluous. Nor is it necessary to the single consideration we have at this moment before us. It is the marvellous progress toward the accord of nations which is shown by the proposal itself and by its well nigh universal acceptance in principle which is important.

The Conference, in the time at its disposal, failed to agree upon the composition of the Court, and the nations in the intervening years have not proceeded with this proposal.

The fact remains, however, that in principle and in every detail save one the nations of the earth have agreed upon a court of extensive competency. We must not underestimate the difficulty of agreeing upon that one detail. The difficulty is far greater

than that involved in settling the composition of the Prize Court. That court exists for a single purpose, and comes into operation only in the event of maritime war. It chiefly concerns a few of the great powers who are always to be represented upon the court. The Arbitral Court concerns all nations in peace as well as war. In any event, thirty to forty countries cannot usually or commonly be represented if the court is to be of workable size. The demand for equality of representation on the court voiced by the Brazilian delegate, M. Barbosa, has recognized force, but his counter-proposal for a court of forty-five judges, divided into three sections of fifteen each, with three-year terms of service, destroys the idea of permanency in judicial determination, which is one of prime importance. If our Supreme Court were trebled in size and worked in triennial shifts it might gain in kaleidoscopic variety of adjudication, but in nothing else.

The demand for representation on the court comes down from the arbitration of the past. We are slow to free ourselves from the accustomed. Probably our forbears had equal difficulty in agreeing to a change from juries composed of friends of the litigants familiar with the cause, to the impartial juries of today unrelated to the parties and uninstructed in the cause.

It is a mistake to suppose that judges are or will be prejudiced by nationality. Lord Alveston certainly brought impartial consideration to the Alaska Boundary Case, as did Judge Gray and Sir Charles Fitzpatrick to the Fisheries Case. Indeed it would be quite impossible in recent arbitral decisions to find evidence of prejudice or partisanship. Of course, if one country might have a national upon the court and the other litigant nation not, there might be ground for permanent refusal to adhere to the convention, but this is not the case, for it is provided that no judge is to sit in a case to which his own country is a party. This single detail should not be insurmountable and it may confidently be hoped that the coming Conference at The Hague will find means to its solution.

No review of the progress of nations toward mutual understanding and good will would be complete if the recent treaties for general arbitration negotiated with Great Britain and France were disregarded. This is not the occasion to consider them in detail or to open the discussion which for a time has been closed adversely by the action of the Senate of the United States.

Our arbitration treaties with these countries, as with others, followed closely the terms of The Hague convention, and excepted from the agreement to arbitrate differences which affected "the vital interests, the independence or the honor of the two contracting states", and those which concerned the interests of third parties.

What do "vital interests" and "honor" mean? Much or little, according to the temper of the moment, or the interest of the party interpreting them. When this country first made demand on Great Britain for compensation for the depredations of the Alabama and other privateers which had sailed from British waters, Lord Russell replied that this demand concerned the honor of Great Britain, of which only Her Majesty's Government could be the judge. But a few years later it was found entirely compatible with that honor to submit the question to arbitration at Geneva. This was of course before there was any treaty for arbitration. But since there has been one, Great Britain has set us and the world an example of high mindedness and broad statesmanship. In the negotiation for the Fisheries Arbitration it must have been early apparent in the framing of Question One that the United States would call in question the right of Great Britain or its dependencies to legislate within its own jurisdictional waters so as to bind American fishermen. No question can concern national honor more clearly than that of its own sovereignty, its right of legislation within its own jurisdiction, but the question concerned the interpretation of a treaty and Great Britain proceeded with the arbitration. The accord of nations and the negligible character of the exception of national honor were signally exemplified.

Why may not questions of honor be adjudicated? When do interests which may be passed upon in court become so far vital that they cannot be? What assurance can there be that they will be more wisely or justly determined by submission to the chances of battle, or worked out by years of continued friction? The Code of Honor is no longer in force between men. Why should it be between nations?

The proposal of the President of the United States was to discard these time-worn exceptions and to arbitrate "all differences" * * * "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." In no way has the good-will between nations

been more emphatically shown than by the reception which this proposal met on both sides of the Atlantic. The Prime Minister of England and the leader of the opposition united in public acceptance of the principle involved. Thousands of meetings of celebration of the dawn of a new era of accord were held on both sides of the water. It matters not that the proposal for the moment failed. The proposal itself and its reception erected new monuments to the accord of nations.

Samuel J. Elder.

Boston, Mass.